Supreme Court, U.S.
FILED
No. 05- 051460 MAY 12 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MARC M. HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a district court commits plain error by sentencing a criminal defendant with the understanding that the U.S. Sentencing Guidelines are mandatory rather than advisory, should the court of appeals:

A) Remand the case for re-sentencing (as is done in the Third Circuit, *United States v. Davis*, 407 F.3d 162 (3d Cir. 2005); the Fourth Circuit, *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005); the Sixth Circuit, *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005); and the Ninth Circuit, *United States v. Ameline*, 400 F.3d 646, 655 (9th Cir. 2005));

B) Grant a limited remand so the district court can indicate whether it would have sentenced differently under an advisory system and then resentence if appropriate (as is done in the Second Circuit, *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005); the Seventh Circuit, *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005); and the District of Columbia Circuit, *United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005)); or

C) Refuse to remand unless the defendant can show a reasonable probability that the district court would sentence differently under an advisory Guidelines system (as is done in the First Circuit, *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005); the Eleventh Circuit, *United States v. Pirani*, 406 F.3d 543 (8th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005); and the Tenth Circuit, *United States v. Gonzalez-Huerta*, 403 F.3d 727, 737 (10th Cir. 2005))?

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Petitioner, Marc M. Harris, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case. Although the District Court imposed sentence in violation of Mr. Harris' Sixth Amendment rights, the Eleventh Circuit refused to vacate and remand for re-sentencing.

INTRODUCTION

Review in this Court is warranted because a three way circuit split exists with regard to the so called "pipeline cases" under *United States v. Booker*, 125 S. Ct. 738 (2005). This term refers to instances where an individual received his sentence prior to the *Booker* decision, but *Booker* was in place for the individual's direct appeal.

Every circuit holds that pipeline defendants are victims of clear error, but because of the circuits' varied approaches on subsequent issues, the district of prosecution regularly determines whether a pipeline defendant will have the opportunity to be re-sentenced or even have a review of his sentence. In four circuits, a pipeline defendant is virtually always entitled to a new sentencing hearing. Three circuits grant a pipeline defendant a limited remand. In these circuits, the district court reviews each case to determine whether a re-sentencing is necessary. Five circuits deny a remand unless the defendant can prove there is a reasonable probability that a different sentence will result.

Mr. Harris finds himself in the worst possible pipeline situation. In clear violation of *Booker*, the District Court used findings supported by the preponderance of the evidence to add 28 offense levels to his guideline calculation. These

additional levels caused his sentence to increase more than 16 years. Yet, because he was prosecuted in the Eleventh Circuit (which employs the most stringent standard for obtaining a remand), Mr. Harris is ineligible for re-sentencing or even limited review because he cannot prove the District Court likely would have sentenced him differently under *Booker's* standards.

Mr. Harris' situation is limited to a certain number of individuals, but this circuit conflict disrupts a major goal of the Sentencing Guidelines: achieving sentencing uniformity. Moreover, *Booker's* purpose was to eliminate Constitutional error from the federal sentencing process. In Mr. Harris' case, neither goal is achieved, and he is serving a sentence of extraordinary length.

OPINIONS AND ORDERS BELOW

The opinion in the Court of Appeals for the Eleventh Circuit is reported at 159 Fed. Appx. 107 (11th Cir. 2005). Mr. Harris sought rehearing and rehearing en banc. The denial of this petition is unreported. Both decisions appear in the Appendix at 1a and 4a.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on December 13, 2005 (App., *infra*, 1a). The Court denied Mr. Harris' petition for rehearing and petition for rehearing en banc on February 13, 2006 (App., *infra*, 4a). Accordingly, the Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT

A. The Charges And The Evidence.

On September 30, 2003, a grand jury in the Southern District of Florida returned a thirty count superseding indictment which charged Mr. Harris with one count of conspiracy to impede and impair the Internal Revenue Service in the ascertainment, computation, assessment, and collection of federal excise and income taxes in violation of 18 U.S.C. § 371 (Count 1); eight counts of attempted federal excise tax evasion in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2 (Counts 2 through 9); one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) (Count 10); six counts of knowingly conducting transactions designed to conceal and disguise the nature, location, source, ownership, and control of proceeds from the smuggling of Freon gas into the United States in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and 18 U.S.C. § 2 (Counts 11 though 16); six counts of money laundering in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2 (Counts 17 through 22); and eight counts of aiding and assisting in the preparation and presentation of false tax returns in violation of 26 U.S.C. § 7206(2) (Counts 23 through 30).

In November 2004, the District Court held a jury trial. The evidence indicated the following:

During the mid-1990's, Mr. Harris owned and operated a financial services business in Panama. This company advised its customers on asset protection and international finance, including how to create off-shore entities. The company also operated investment funds.

In January 1993, Mr. Harris met Aurielo and Joseph Vigna who owned and operated V&V Wholesale Distributors, Inc. ("V&V/Florida"). For the most part, V&V/Florida distributed dichlorodifluoromethane gas (commonly known as Freon) to customers in the United States. At the time, the United States had strict Freon regulations and excise taxes against domestic Freon sales. V&V/Florida evaded these taxes by telling the IRS that V&V/Florida was exporting Freon when, in fact, V&V/Florida was shipping the Freon domestically.

According to the United States, Mr. Harris assisted V&V/Florida's evasion in several ways. First, Mr. Harris set up a corporate structure and invoicing sequence which created the appearance that V&V/Florida was actually exporting Freon to Panama rather than selling domestically.

In short, Mr. Harris and V&V set up two Panamanian companies. One had a similar name and address to V&V/Florida ("V&V/Panama"). V&V/Panama created invoices to V&V/Florida's customers to make it appear that they were purchasing Freon which originated in Panama. V&V/Florida billed the second Panamanian company to make it appear that V&V/Florida was exporting the Freon to Panama. These bills also allowed V&V/Florida to repatriate funds and purchase additional Freon. The profits collected in Panama.

Second, Mr. Harris arranged for various transactions and payments which reduced V&V/Florida's income taxes and the Vigna's income taxes. For example, Joseph Vigna wrote checks to V&V/Panama for purported business expenses and then used these expenses to reduce V&V/Florida's tax liability. In addition, Mr. Harris arranged for Joseph Vigna to transfer money from V&V/Florida to a Panamanian

company (Lauderdale Corporation). Lauderdale Corporation loaned Joseph Vigna money to purchase a home, and Joseph Vigna deducted the interest payments on his personal income tax returns.

Mr. Harris received money to set up this structure and a percentage fee for transactions through the structure.

In 1994, the Internal Revenue Service commenced an audit of V&V/Florida. According to the United States, Mr. Harris interfered with the audit: by counseling the Vignas on how to obstruct the audit; by counseling the Vignas to withhold documentation, to destroy documentation, and to provide false documentation; and by sending an accountant to meet with the revenue agent and obfuscate the true nature of V&V/Florida's business and finances.

The United States also presented evidence that Mr. Harris interfered with the criminal investigation of the Vignas and V&V/Florida by counseling them to relocate to Panama, and by helping them relocate.

In 1996, after the Vignas were in Panama, Mr. Harris became involved with Moises and Frank Kriger and their company Caribe sales. According to the United States, Mr. Harris sold the Krigers a Panamanian company, Cornell Consulting, and advised the Krigers to have Cornell sell consulting invoices to Caribe. Caribe sent money to the Panamanian company and deducted these amounts from Caribe's tax returns as business expenses. These transactions also allowed Caribe to expatriate funds from the United States.

The United States contended that Mr. Harris also advised the Krigers to set up a bogus Caribe subsidiary in Panama. This subsidiary made purported loans to the Krigers which were actually a mechanism for repatriating money.

The jury found Mr. Harris guilty of Counts 1-3 (conspiring to impair and impede the functions of the IRS and tax evasion), 10-16 (Conspiracy to launder money and money laundering-concealment), and 17-22 (money laundering). The jury found Mr. Harris not guilty of Counts 4-9 and 23-30.

The jury did not determine the amount of taxes evaded, the amount of money laundered, the sophistication of the scheme, Mr. Harris' role in the offense, or whether Mr. Harris engaged in obstruction of justice.

B. The Sentence.

The jury determined three issues beyond a reasonable doubt: 1. Mr. Harris conspired with others to evade taxes, impair the mission of the IRS, and launder money; 2. Mr. Harris engaged in tax evasion; and 3. Mr. Harris engaged in money laundering. These findings are sufficient to support a guidelines offense level of 8 (6 levels for tax evasion and 2 additional points because the defendant engaged in money laundering).

Given the applicable guidelines, the corresponding sentencing range would be 0-6 months.

By contrast, Mr. Harris' sentencing proceedings yielded a sentence of 204 months. The District Court reached this sentence by using the preponderance of the evidence standard to determine that several sentencing enhancements applied to Mr. Harris.

The District Court relied upon the Pre-Sentence Investigation Report ("PSI") that the United States Probation Office prepared. The PSI separated Mr. Harris' conduct into two groups: the tax offenses and the money laundering offenses. Under the relevant grouping rules, the PSI determined it was appropriate to calculate the guidelines sentence with the money laundering provisions. At the same time, the money laundering sections refer to the underlying offense (which was tax evasion). Accordingly, as a practical matter, Mr. Harris' sentence depended largely on the tax loss calculations.

The PSI awarded Mr. Harris a base offense level of 26. Mr. Harris received 6 levels under § 2T1.1 and 18 more levels based on a total tax loss calculation of $6,588,949.50. Mr. Harris received 2 additional levels under § 2T3.1 because his conduct involved sophisticated means.

The PSI added 2 levels under § 2S1.1(b)(2)(B) because the jury convicted Mr. Harris under 18 U.S.C. § 1956, and 2 more levels under § 2S1.1(b)(3) because the PSI determined Mr. Harris engaged in sophisticated money laundering. In addition, the PSI awarded Mr. Harris 4 levels under § 3B1.1(c) because it determined he was an organizer or leader of criminal activity that involved 5 or more participants or was otherwise extensive. Finally, the PSI granted Mr. Harris 2 levels under § 3C1.1 because it determined Mr. Harris obstructed the IRS's criminal investigation.

In the end, the PSI awarded Mr. Harris a total offense level of 36. With no prior criminal convictions, Mr. Harris fell within criminal history category I.

At sentencing, the District Court essentially ratified the PSI. The District Court awarded Mr. Harris an offense level of 36 based on its conclusions (supported by a preponderance of the evidence) that Mr. Harris:

- Engaged money laundering and tax evasion;
- Evaded over $6 million in taxes;
- Laundered over $14 million related to Freon smuggling;
- Used sophisticated means to evade taxes;
- Used sophisticated means to launder money;
- Was an organizer or leader of criminal activity; and
- Obstructed Justice.

As a result of these determinations, the District Court added 28 offense levels to Mr. Harris' guidelines calculations and no less than 198 months of prison time.

REASON FOR GRANTING THE PETITION

This Court should grant this petition to resolve the three way conflict that exists among the courts of appeals when it comes to dealing with pipeline defendants under *United States v. Booker*, 125 S. Ct. 738 (2005).

The majority of circuits essentially guarantee some form of review for sentences imposed in violation of *Booker*. Four circuits (the 3rd, 4th, 6th, and 9th circuits) basically grant a full remand once the defendant identifies a *Booker* error. Three circuits (the 2nd, 7th, and D.C. circuits) provide a limited remand so the district court can determine whether a new sentencing is appropriate in the particular case. If the district

court indicates that a different sentence is appropriate in light of *Booker*, the defendant receives a full remand.

A minority (the 1st, 5th 8th, and 11th circuits) requires the defendant to prove that review of the sentence is appropriate. Consequently, in these circuits, there are cases where the *Booker* error is clear, but the defendant has no remedy.

Mr. Harris falls into this category. The District Court violated *Booker* by making factual findings under the preponderance of evidence standard and then using these findings to enhance Mr. Harris' sentence in excess of 16 years. The Eleventh Circuit Court of Appeals denied Mr. Harris' request for a remand. It ruled that he was not able to show plain error. *See United States v. Harris*, 159 Fed. Appx. 107, 108 (11th Cir. 2005).

This Court should resolve the circuit split to ensure uniformity in sentencing and to ensure that all criminal defendants get the benefit of their *Booker* rights.

A. The Booker Ruling And Its Effects On Federal Criminal Sentencing.

In *Booker*, this Court held that in a "world" that includes mandatory application of the sentencing guidelines, the Sixth Amendment requires that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 756.

In light of this Sixth Amendment requirement, this Court found it necessary to modify the Sentencing Guidelines. This Court severed and excised subsection 3553(b)(1) (which required the sentencing court to select a sentence within the applicable guidelines range unless the court could identify an applicable statutory basis for a departure) and subsection 3742(e) (which set the standards of appellate review). *Id.* at 764.

In this way, this Court made the Sentencing Guidelines advisory. As the Second Circuit explained:

> Thus, the excision of the mandatory aspect of the Guidelines does not mean that the Guidelines have been discarded. On the contrary, sentencing judges remain under a duty with respect to the Guidelines— not the previously imposed duty to apply the Guidelines, but the continuing duty to "consider" them, along with the other factors listed in *section* 3553(a).

See United States v. Crosby, 397 F.3d 103, 111 (2d Cir. 2005).

This ruling spawned several questions. On some of these issues, the circuit courts have reached complete agreement. First, every circuit agrees that *Booker* applies to these "pipeline" cases. Second, every circuit agrees that plain error is the appropriate standard of review for defendants who did not raise the *Booker* issue at sentencing, but raised it on direct appeal. Third, every circuit agrees that the four part test set forth in *United States v. Olano*, 507 U.S. 725, 732-736 (1993), is the correct method to assess whether plain error exists. Fourth, every circuit agrees that error exists when a sentencing court calculates a sentence with the understanding that following the sentencing guidelines was mandatory.

From this point, the circuits separate into three groups. The first generally requires a remand for sentences imposed under a mandatory Guidelines system. The second considers automatic re-sentencing inappropriate, but grants district court review to determine whether a new sentencing would yield a different result in light of *Booker*. The third holds that unless a defendant can show the district court probably would have acted differently using advisory guidelines, review is inappropriate.

At bottom, the dispute is on how to handle the last two *Olano* factors:

- Whether the *Booker* error affected the defendant's substantial rights or was prejudicial; and
- Whether the *Booker* error seriously affected the fairness, integrity, or public reputation of judicial proceedings

The circuits that provide an automatic remand or limited review do so because they presume that a sentence imposed under mandatory guidelines creates error sufficient to satisfy these two requirements. The remaining circuits are unwilling to make this presumption and require the defendant to meet his burden in every case.

B. The Automatic Remand Circuits.

Four circuits essentially provide an automatic remand to defendants who received a sentence in violation of *Booker*. *See, e.g.*, *United States v. Davis*, 407 F.3d 162 (3d Cir. 2005); *United States v. Ameline*, 400 F.3d 646 (9th Cir. 2005); *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005); *United States*

v. Oliver, 397 F.3d 369 (6th Cir. 2005). These circuits have determined that regardless of whether there is evidence that the district court would have acted differently under advisory guidelines, a *Booker* error requires a re-sentencing.

United States v. Davis, 407 F.3d 162 (3d Cir. 2005), explains the rationale for this approach:

> Where the District Court imposed a sentence greater than the maximum authorized by the facts found by the jury alone, the outcome of sentencing was altered to the defendant's detriment. Mandatory enhancement of a sentence in violation of the *Sixth Amendment* is prejudicial and affects the substantial rights of the defendant. As we have noted, "imposing a sentence not authorized by law seriously affects the fairness, integrity, and reputation of the proceedings." In cases where a defendant's sentence was enhanced based on facts neither admitted to nor found by a jury, therefore, the defendant can demonstrate plain error and may be entitled to a resentencing.
>
> Similarly, a defendant's substantial rights may have been affected where the District Court erred by treating the Guidelines as mandatory rather than advisory. At this stage, we cannot ascertain whether the District Court would have imposed a greater or lesser sentence under an advisory framework. But the mandatory nature of the Guidelines controlled the District Court's analysis. Because the sentencing calculus was governed by a Guidelines framework erroneously believed to be mandatory, the outcome of each

> sentencing hearing conducted under this framework was necessarily affected. Although plain error jurisprudence generally places the burden on an appellant to demonstrate specific prejudice flowing from the District Court's error, in this context— where mandatory sentencing was governed by an erroneous scheme— prejudice can be presumed.

Id. at 164-65 (internal citations omitted).

C. The Limited Remand Circuits.

Three circuits are unwilling to remand every case, but they grant limited review. *See, e.g., United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005); *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005); *United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005).

These circuits recognize the clear Sixth Amendment error that occurs when a district court either: 1) "mak[es] factual findings and mandatorily enhanc[es] a sentence above the range applicable to facts found by a jury or admitted by a defendant;" or 2) mandatorily appl[ies] the applicable Guidelines range that was based solely on facts found by a jury or admitted by the defendant." *United States v. Crosby*, 397 F.3d at 115.

At the same time, these circuits are unwilling to presume this error would have resulted in a longer sentence. As Judge Newman summed it up for the Second Circuit:

> In short, a sentence imposed under a mistaken perception of the requirements of law will satisfy

> a plain error analysis if the sentence imposed under a correct understanding would have been materially different. It is readily apparent to us that a sentence imposed prior to Booker/Fanfan was imposed without an understanding of sentencing law as subsequently explained by the Supreme Court. However, we cannot know whether a correct perception of the law would have produced a different sentence.

United States v. Crosby, 397 F.3d 103, 118 (2d Cir. 2005). *See also*, *United States v. White*, 406 F.3d 827, 836 (7th Cir. 2005) ("What remains uncertain at this stage of our review, however, is whether the district court, operating under its newfound post-*Booker* discretion would have sentenced the defendant any differently."); *United States v. Coles*, 403 F.3d 764, 769 (D.C. Cir. 2005) ("In a case like this one, however, the record simply is not sufficient for an appellate court to determine prejudice with any confidence.").

Because these circuits find the prospect of un-remedied plain error inappropriate, they return each case to the district court so the sentencing judge can resolve the ambiguity.[1] As Judge Posner explained:

> The only practical way (and it happens also to be the shortest, the easiest, the quickest, and the

1. The Second Circuit relinquishes jurisdiction and grants the district court power to vacate any inappropriate sentence. *See United States v. Crosby*, 397 F.3d 103, 120 (2d Cir. 2005). The Seventh Circuit and the District of Columbia Circuit retain jurisdiction and actually vacate any sentences that the district courts identify as inappropriate. *See United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005); *United States v. Coles*, 403 F.3d 764, 769 (D.C. Cir. 2005).

> surest way) to determine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge.

United States v. Paladino, 401 F.3d 471, 483 (7th Cir. 2005). *See also United States v. Crosby*, 397 F.3d 103, 118 (2d Cir. 2005) ("If a district court determines that a nontrivially different sentence would have been imposed, that determination completes the demonstration that the plain error test is met.").

Judge Posner justified this approach as a way to protect Sixth Amendment rights without requiring unnecessary proceedings. He noted:

> Given the alternative of simply asking the district judge to tell us whether he would have given a different sentence, and thus dispelling the epistemic fog, we cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence. *Crosby* is the middle way between placing on the defendant the burden of proving that the sentencing judge would have imposed a different sentence had the judge not thought the guidelines mandatory and requiring that all defendants whose cases were pending when Booker was decided are entitled to be resentenced, even when it is clear that the judge would impose the same sentence and the court of appeals would affirm.

United States v. Paladino, 401 F.3d 471, 484-85 (7th Cir. 2005).

D. Circuits Where The Defendant Has The Burden.

The last group of circuit courts will only remand if the defendant can show he is likely to receive a materially different sentence. *See, e.g., United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Pirani*, 406 F.3d 543 (8th Cir. 2005); *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005).

Although these circuits recognize there is a *Booker* error, they are unwilling to presume that the error was "prejudicial" or that it "affects the fairness, integrity, or public reputation of judicial proceedings." Accordingly, these circuits require the defendant to make a showing. As Judge Carnes explained:

> . . . [T]he burden truly is on the defendant to show that the error actually did make a difference: if it is equally plausible that the error worked in favor of the defense, the defense loses; if the effect of the error is uncertain so that we do not know which, if either, side it helped the defendant loses. Where errors could have cut either way and uncertainty exists, the burden is the decisive factor in the third prong of the plain error test, and the burden is on the defendant.

United States v. Rodriguez, 398 F.3d 1291, 1299 (11th Cir. 2005).

The First Fifth, Eight, and Eleventh Circuits hang up on *Olano's* third prong. Unless the defendant can demonstrate there is a "reasonable probability" he would have received a

lower sentence if the district court proceeded under an advisory Guidelines system, the defendant's appeal will fail. *See, e.g., United States v. Antonakopoulos*, 399 F.3d 68, 78 (1st Cir. 2005); *United States v. Pirani*, 406 F.3d 543, 553 (8th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir. 2005). The Tenth Circuit has ruled that *Olano's* fourth prong can be fatal to a defendant. *See, e.g., United States v. Gonzalez-Huerta*, 403 F.3d 727, 737 (10th Cir. 2005) ("Mr. Gonzalez-Huerta fails to meet his burden to satisfy the fourth prong of plain-error review.").

Regardless, the pipeline defendant who cannot make this showing receives no review.

E. Mr. Harris' Case Is Appropriate For Review.

Mr. Harris' case reveals why placing the burden on the defendant is inappropriate, and it provides a suitable vehicle for resolving the pending conflict between the circuits.

There is no question that Mr. Harris' sentencing proceedings were infected with *Booker* error. The District Court proceeded under the assumption that the sentencing guidelines were mandatory. Furthermore, in the face of strenuous objection, the District Court greatly enhanced Mr. Harris' sentence by making a series of factual findings under the preponderance of evidence standard.

If Mr. Harris were in any of eight other circuits, there would be review of this situation, and he and the judicial system would have certainty that the error in his sentencing did not translate into a longer sentence. Moreover, if the error did create a longer sentence, the problem would be corrected.

Yet, because he was prosecuted in Florida, Mr. Harris will not have this opportunity without this Court's intervention. The record in his case simply does not satisfy the Eleventh Circuit's approach (which falls within the most stringent category).

This situation is inappropriate. The absence of a specific indication from the District Judge should give this Court no comfort that Mr. Harris, or any other pipeline defendant received a sentence in compliance with the Constitution.

Given the state of the pre-Booker world, district courts had no reason to hint at what they might have done given advisory Guidelines. After all, such a sentencing structure did not exist at the time, and the Sentencing Guidelines were well accepted. As Judges Brisco and Lucero wrote:

> [The sentencing] was conducted by the district court under what we now know was the mistaken assumption that the Sentencing Guidelines were to be applied in a mandatory fashion. Thus there was no opportunity or incentive, as there is now post-Booker, [ ] to present evidence or arguments outside of the bounds allowed by the Guidelines.
>
> * * *
>
> The majority quickly moves past this problem, suggesting only that prejudice might be found to exist if there are statements in the record from the sentencing court expressing dissatisfaction with the Guidelines sentence it believed, at the time, it was required to impose. Focusing the prejudice analysis on such evidence, however,

> ignores the reality of the pre-Booker sentencing landscape. It is beyond dispute that the federal circuits including our own, "repeatedly instructed sentencing courts pre-Booker to impose sentences within the applicable Guidelines range, with limited exceptions, and . . . consistently upheld the constitutionality of the Guidelines and their mandatory nature. . . . In turn, "this well-established case law substantially undermined any need or incentive for sentencing courts pre-Booker to note their objections and reservations in sentencing defendants under the then-mandatory Guidelines. Thus, I agree with the Sixth Circuit that "it would be improper," and indeed cruelly ironic, for us to now "require defendants" [ ] "to produce this type of evidence— that sentencing courts had no reason to provide under our pre-Booker case law— in order establish that their substantial rights have been affected.

United States v. Gonzalez-Huerta, 403 F.3d 727, 753 (10th Cir. 2005) (Brisco and Lucero Dissenting).

This point is especially poignant given Judges Brisco's and Lucero's review of the U.S. Sentencing Commission's data regarding the length of post-*Booker* sentences. These figures reveal that approximately 13.7% of all post-*Booker* sentences were below the advisory Guideline range for a reason other than a government sponsored reduction. *See Id.* at 754. Extrapolating this data supports the notion that 13.7% of the individuals who have been denied a remand under *Booker* will serve a longer sentence than necessary.

Under these circumstances, this Court can have no confidence that the 16 years of enhancements on Mr. Harris' sentence are consistent with the Sixth Amendment and *Booker*.

In a similar situation, the Ninth Circuit noted: "we have no doubt that the constitutional error affected [the defendant's] substantial rights." The opinion goes on to say: "[R]emand is necessary because letting [the defendant's] sentence stand 'simply because it may happen to fall within the range of reasonableness unquestionably impugns the fairness, integrity, or public reputation of judicial proceedings." *United States v. Ameline*, 400 F.3d 646 (9th Cir. 2005).

This Court should review this case to ensure that there is a procedure for Mr. Harris and the other pipeline defendants to vindicate their Sixth Amendment rights. For as this Court has written: "A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist." *Von Hoffman v. City of Quincy*, 71 U.S. 535, 554 (1866).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 13, 2005

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-12777

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARC M. HARRIS,

Defendant-Appellant.

JUDGES: Before DUBINA and KRAVITCH, Circuit Judges, and STROM,* District Judge.

OPINION: PER CURIAM:

Appellant Marc M. Harris ("Harris") appeals his convictions and sentences imposed by the United States District Court for the Southern District of Florida.

The issues presented for appellate review are (1) whether the district court correctly determined that the statute of limitations had not expired on any of the counts in the

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* Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

superseding indictment; (2) whether the district court abused its discretion in denying Harris's motion to dismiss the indictment for pre-indictment delay; (3) whether the district court correctly concluded that Harris was charged with and convicted of a single crime under the conspiracy to defraud count returned by the grand jury in the superseding indictment; and (4) whether the district court committed plain error by treating the Sentencing Guidelines as mandatory.

The district court's denial of a motion to dismiss is reviewed for abuse of discretion. *United States v. Quiala*, 19 F.3d 569, 570 (11th Cir. 1994). This court reviews *de novo* "the district court's interpretation and application of the statute of limitations. . . ." *United States v. Gilbert*, 136 F.3d 1451, 1453 (11th Cir. 1998).

A district court's refusal to dismiss an indictment for pre-indictment delay is subject to review for an abuse of discretion. *United States v. Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996).

A district court's determination that the conspiracy count was not duplicitous is reviewed *de novo*. *United States v. Burton*, 871 F.2d 1566, 1573 (11th Cir. 1989).

Any error in the district court's sentencing Harris under the then-mandatory Guidelines system is subject to plain error review. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005), *cert. denied*, __ U.S. __, 125 S. Ct. 2935, 162 L. Ed.2d 866 (2005).

Appendix A

Because we conclude from the record that there is no merit to any of the arguments Harris makes on appeal, we affirm his convictions and sentences.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC FILED FEBRUARY 13, 2006

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12777-HH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARC M. HARRIS,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

Before: DUBINA and KRAVITCH, Circuit Judges, and STROM,* District Judge.

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* Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

Appendix B

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE